No. 4693

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IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

IN THE MATTER OF
RUSSELL O. DOUGLASS,
Bankrupt,

RUSSELL O. DOUGLASS,
Petitioner,

vs.

ROY W. BLAIR, as Trustee in Bankruptcy of the Estate of Russell O. Douglass,
Respondent.

Brief of Respondent and Appellee

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Petitioner and appellant, the bankrupt, claiming to be a creditor by virtue of a gift of the claim of his brother, resisted the efforts of the trustee in bankruptcy, the respondent and appellee herein, to take possession of his individual

assets and, having been unsuccessful in this effort, now seeks to prevent the sale of his assets in the bankruptcy proceeding. The referee in bankruptcy after a full hearing ordered the sale to be made. Petitioner and appellant thereupon petitioned the District Court for a revision and upon affidavit secured an order to show cause returnable on August 18th, 1925. A hearing was held on August 21st, 1925, by said District Court, evidence was received and after full consideration and argument the order to show cause was dissolved by the minute order from which this appeal was taken. Petitioner and appellant has not seen fit to bring here in his transcript on appeal any of the evidence taken at this hearing (save the verified petition therefor), requested no findings of fact from the referee or from the District Court, and no findings of fact were made by either tribunal.

Petitioner and appellant advises us on page two of his brief that this proceeding was instituted to escape from certain partnership creditors to whom he was also individually liable. He listed these in his schedules and includes therein seventeen partnership creditors. Obviously one of the objects of this bankruptcy is to obtain a discharge of these obligations. Yet he now contends that these partnership creditors are not interested in his estate, cannot file claims

therein, and that there was a novation after the bankruptcy by which a new firm was substituted as debtor thereon. The position of respondent and appellee is that the judgment should be affirmed for four reasons: (1st) The partnership creditors were properly allowed to prove their claims in the bankruptcy of this individual; (2nd) there has been no novation or release of these debts; (3rd) all the matters sought to be adjudicated here have been settled by a prior judgment which has become final, and (4th) appellant should be denied any relief for his failure to bring up the record.

THE PARTNERSHIP CREDITORS WERE PROPERLY ALLOWED TO PROVE THEIR CLAIMS IN THE BANKRUPTCY OF PETITIONER.

"Every general partner is liable to third persons for all the obligations of the partnership jointly with his co-partners." California Civil Code, Sec. 2442. And this is but a re-statement of the general rule of liability existing in every common-law jurisdiction. This general principle governs except so far as it may be changed by the laws relating to bankruptcy. The Bankruptcy Act makes certain provisions for the marshalling of assets and by Section 5 (f)

provides:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts . . . ."

This provision would seem clear enough but appellant cites 7 Corpus Juris. 282 as holding that a partnership creditor cannot prove his claim against the individual estate. The portion involved reads as follows:

> "A firm creditor may prove his claim against the estate of the partnership but not against the estate of an individual partner. Where a bankrupt firm and the individual partners are jointly liable, the creditor may prove his claim against the estate of the partnership and also against the estate of the individual partners."

In support of the first proposition a few decisions are cited which do not appear to have taken into consideration the above quoted clear and decisive language of the Bankruptcy Act.

Among these is *Lamville County Nat. Bank* v. *Stevens,* 107 Fed. 245; 6 A. B. R. 164, upon

which appellant seems to place considerable reliance. Upon examination it will be seen that the decision comes from Vermont where the rule is that partnership creditors must absolutely exhaust the partnership assets before they can have any claim against the individual partner.

> *Bardwell* v. *Perry,* 19 Vt. 292; 47 Am. Dec. 687.
> *Rice* v. *Barnard,* 20 Vt. 479; 50 Am. Dec. 54.

Others of the decisions come from states like Louisiana where a partnership is a more distinct entity and quite different rules of liability govern.

Other writers have taken the opposite view. For example:

> "If one partner files a voluntary petition seeking a discharge from both individual and firm debts, and is adjudged bankrupt, but no adjudication is made against the firm, the firm creditors may prove their debts and subject bankrupt's interest in the firm property to the payment thereof. If the firm property is not brought into bankruptcy and there are no firm assets, it has been held that a partnership creditor may share with the individual creditors in the estate of the bankrupt individual partner."
>
> *Brandenburg on Bankruptcy* (4th ed.), p. 424.

> "A partnership debt is provable against the bankrupt estate of an individual partner," and "There is authority .... that an order allowing a creditor's claim against the bankrupt estate of an individual partner and also against the estate of the bankrupt partnership, the allowance against the individual estate being made subject to the claims of the individual creditors of that estate, proceeds upon well settled principles of law broad enough to sustain it without reference to the provisions of the bankruptcy law."

3 Ruling Case Law, p. 213.

A direct adjudication of our Supreme Court furnishes the basis for the latter statement. In this case partnership claims were allowed in the bankruptcy of the individual partner but the allowance was made subject to the preferential rights of the individual creditors. This was said to proceed upon well settled general principles of law, though it is to be noted that it was in accordance with the above quoted provision of the Bankruptcy Act.

Chapman v. *Bowen*, 207 U. S. 89; 52 U. S. (L. Ed.) 116.

A later decision of the Supreme Court, arising out of a somewhat different state of facts, discusses the problem quite clearly and throws considerable light upon it. Here the partnership had been adjudicated bankrupt and the in-

dividual partner, who was not in bankruptcy, was endeavoring to retain all of his individual assets upon reasoning similar to that used by appellant here. In considering this situation, MR. JUSTICE HOLMES said:

> "But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the Bankruptcy Act."

Francis v. *McNeal*, 228 U. S. 695.

In involuntary proceedings the question as to the status of partnership creditors has been directly adjudicated. These decisions are of interest since the Courts were not concerned there (and we are not here) with questions of priority and the marshalling of assets. The holdings are uniformly to the effect that a partnership creditor is a proper petitioner in involuntary bankruptcy against an individual.

In re Hee, 13 A. B. R. 8.
In re Mercur, 95 Fed. 634; 2 A. B. R. 626.
Mills v. *J. H. Fisher & Co.*, 159 Fed. 897; 20 A. B. R. 237.
No. 238 Remington on Bankruptcy (3rd ed.)

Thus it appears that partnership creditors are entitled to prove their claims in the bankruptcy of the individual partner. This is true because the partners are jointly and severally liable for partnership debts in California and the Bankruptcy Act does not attempt to divest this liability. And while it does provide for the marshalling of assets, we are not concerned with the relative rights of the several classes of creditors at this stage of the bankruptcy proceedings. Moreover, it is to be questioned whether petitioner and appellant is in a position to raise this objection. He filed his schedules listing these persons as his creditors. They have been delayed in enforcing their obligations by this bankruptcy. If he is a creditor of his estate, as he claims to be, he should be estopped to make this objection.

THERE HAS BEEN NO NOVATION OR RELEASE OF PARTNERSHIP DEBTS.

In support of his position that there was a novation which released him from the partnership debts, petitioner and appellant offers a purported contract signed by one secured creditor as trustee but not individually and by one other secured creditor. The contract (Trans., pp. 21-26) recites that it is made between the

debtors, F. L. McGrew, trustee, and "the several persons, companies and firms whose names are hereunto signed." In the middle of it appears "It is agreed that said C. D. LeMaster and Curtis H. Cutter, two of the subscribing creditors," shall make certain advances. The only signatures other than those of the partners and their wives are "F. L. McGrew, Trustee, and C. D. LeMasters." Curtis H. Cutter did not sign at all, F. L. McGrew only signed as trustee and none of the other creditors referred to and no unsecured creditor assented in this proposed arrangement.

Petitioner and appellant contends that this contract should be interpreted as releasing him from his partnership obligations. To accomplish such a purpose it would have to be signed by the partnership creditors.

> "A contract purporting to be made between several parties, containing mutual covenants of which those of one party are the consideration of those of the other, must, to be valid, be executed by all."

> 6 Cal. Juris. 229.
> *Emeric* v. *Alvarado,* 64 Cal. 529.
> *Twckesbury* v. *O'Connell,* 21 Cal. 61.
> *Clint* v. *Eureka Crude Oil Co.,* 3 Cal. A. 463.

But we do not interpret this contract as releasing him. The only provision relating to the

rights of the creditors who were expected to sign the agreement is that after the payment of certain other claims "the said trustees shall use the assets accumulated from time to time to be distributed to the general creditors at such time as may hereafter be agreed upon by such trustee and the creditors' committee hereinafter named." There is nothing here by which any creditor who might have signed it would release this bankrupt or consent to the substitution of a new debtor. And there can be no novation unless the debtor agrees to accept the new debtor in place of the old.

> "An agreement between the debtor and another that such other shall pay the debtor's creditors does not amount to a novation where the creditors do not assent, or are not parties to the understanding."

20 Cal. Juris. 252.
Meyer v. *Parsons*, 129 Cal. 653.
Market Street Railway v. *Hellman*, 109 Cal. 571.
Molera v. *Cooper*, 173 Cal. 259.
Chapin v. *Brown*, 101 Cal. 500.

The facts of the last case cited are somewhat similar to the situation presented here. There a partnership, which had been engaged in the business of cutting and delivering lumber, was changed by the admission of a new partner. The new partnership continued to deliver lum-

ber under the contract of the former one and the creditor received the lumber without objection. It was held that this dealing with the new partnership did not operate by novation or otherwise to release the first partnership from its contract.

At one point in his brief, petitioner and appellant contends strenuously that he had a right to enter into this contract, while at another he seems to take the position that the trustee has assumed something and must take the burdens with it. His title passed to respondent and appellee, the trustee in bankruptcy, and the bankrupt could do nothing except to preserve the property, but his partners had a right to continue their administration of the partnership business. The trustee made no effort to interfere with them or with this contract which they made. After an examination he wisely decided to abandon the property as worthless. His right to take such a course is affirmed by one of the decisions quoted by appellant.

> *In re Chambers, Calder & Co.*, 98 Fed. 865.

There it was held that the trustee was not bound to accept property or to assume a burdensome contract. The case involved the retention of possession of some leased premises. The re-

tention for a short time did not constitute an assumption of the lease and the estate was only liable for rent for the time the premises were occupied.

Since the trustee did abandon this partnership property and had no connection with the contract, it is difficult to understand the application of the cases cited on page ten of appellant's brief. They enunciate the proposition that a trustee who assumes a contract takes it with its burdens. And *Olmstead* v. *Dauphiny,* 104 Cal. 635, applies only to a situation where one buys a business and assumes the debts without knowing exactly what they are. There he was held to have assumed those of which he did not know as well as those known to him.

In the case at bar the trustee did not assume any contract. He very wisely abandoned this heavily encumbered property as worthless. The contract relied on by appellant did not provide for any release of the bankrupt from his obligations, and, even if it had done so, it would not concern us since the parties did not execute the contract. We conclude that there has been no novation or release by the creditors.

ALL THE MATTERS SOUGHT TO BE ADJUDICATED HAVE BEEN SETTLED BY A FORMER JUDGMENT WHICH HAS BECOME FINAL.

It appears from the petition to revise (Trans., p. 2) that the referee in bankruptcy ordered petitioner and appellant to turn all of his property over to respondent, the trustee in bankruptcy, and that petitioner resisted said order and petitioned the District Court for a revision thereof. The matter was heard by the Hon. George M. Bourquin, who denied the petition. In doing so he aply stated that petitioner "virtually claims his bankruptcy is but pretended, and strategy to hinder and delay creditors—— was in bad faith! Although this might afford ground for inquiry anent his abuse of the equity powers of the Court, it can avail him nothing to avoid his duty to deliver up his property, so long as the adjudication in bankruptcy stands." (Trans., p. 29.)

It will be noted that all of the points raised by petitioner and appellant in resisting the order of sale of his property were and could be raised on appeal from the order directing him to surrender his property to the trustee.

Where errors or defects have already been reviewed in another proceeding, they will not be reviewed again. The proposition is a general one and applies in bankruptcy matters as well as in other classes of litigation.

> *Beach* v. *Macon Grocery Co.*, 120 Fed. 736; 9 A. B. R. 762.

And it has been applied to a set of facts essentially similar to the case at bar. In one instance an order was made directing certain property turned over to the trustee until the wife of the bankrupt should establish her title thereto. This order was made in the bankruptcy proceeding and was not appealed from. Later the referee after a hearing ordered the property turned over to the trustee. The wife then objected that the referee had no jurisdiction. The Court held:

> "Having elected to go on with such examination without taking any further steps to review the orders under which it was conducted, petitioner cannot now be heard to question the jurisdiction."

> *In re Bacon*, 159 Fed. 424; 20 A. B. R. 107.

It is submitted that petitioner and appellant finds himself in a similar position. When ordered to surrender his property to the trustee he resisted to the extent of petitioning for a revision

of that order. No doubt stung by JUDGE BOURQUIN's just rebuke, he became afraid of the consequences and desisted. Having allowed that judgment to become final, he should not be heard now to complain of the same alleged errors.

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO BRING UP THE RECORD.

As previously stated, petitioner and appellant has brought here only his affidavit and the order from which the appeal was taken. The affidavit was the basis for an order to show cause which was dissolved after a full hearing by the District Court. He supplies us with none of the evidence taken at that hearing. He requested no findings of fact and none were made. The great weight of authority is that in such cases the Court will refuse to even consider the matter.

Our Supreme Court has passed upon an analogous situation in a case where a master was appointed to take testimony but was not directed to preserve it and certify it to the Court. Although the evidence brought up did not support some of the findings, the Court presumed that there was other evidence to support these.

Sheffield v. *Gordon,* 151 U. S. 285.

The reason for the rule is thus stated in a decision from the Second Circuit:

> "Manifestly we are not at liberty to consider as facts statements made in the briefs of the petitioning creditors which are unsupported by the record."
> *In re Oakland Lumber Co.,* 174 Fed. 634; 23 A. B. R. 181.

In an earlier case the Court simply assumed that the District Court had received evidence sufficient to support its decision in a case in which, as here, no findings were made.

In re O'Connell, 137 Fed. 838; 14 A. B. R. 237.

And where a petition to revise contained no agreed statement of facts and no findings, review was denied in

Landry v. *San Antonio Brewing Assn.,* 159 Fed. 700; 20 A. B. R. 226.

In another case where the record disclosed no findings of fact and no application to the Court therefor, the Court refused to consider the matter at all.

In re Boston Dry Goods Co., 125 Fed. 226; 11 A. B. R. 97.

Numerous other cases to the same effect can be found throughout the reports. Among them are:

In re Pettigill & Co., 137 Fed. 840; 14 A. B. R. 757.

In re Baum, 169 Fed. 410; 22 A. B. R. 295.

In re Schuman, 276 Fed. 292.

In re Wood, 248 Fed. 246.

By his failure to have findings made, petitioner and appellant has made it impossible for us to present a number of our contentions to this Court in proper fashion. He has carefully culled out a small portion of the record which he thinks will support his claims and brought only that part here. This attitude makes it difficult or impossible for the Court to get before it all of the facts and limits us to those defects appearing on the face of the portion of the record with which he has favored us. Taking into consideration the fact that he is trying by these means to retain all of his assets and secure a discharge of his partnership obligations, we submit that this Court should enforce the rule against him with all its rigor and should refuse to even consider the matter.

CONCLUSION.

Petitioner and appellant was engaged in the stage business by himself and had substantial

assets in connection therewith. He was also a partner in a lumber business. The lumber business became involved and unable to meet its debts. Petitioner thereupon filed his bankruptcy petition and listed as creditors the creditors of the partnership. Thereafter, although his interest in the partnership business had passed to the trustee, he attempted to join his partners in a contract by which the lumber business was to be continued and any profits were to be paid to the partnership creditors. This attempted contract was not properly executed. He cannot now contend that these partnership creditors are not proper claimants in the bankruptcy proceedings or that their debts have been discharged or a novation accomplished by an agreement not executed by all of the parties and not assented in by his creditors. Moreover, he has already resisted the order to surrender his property upon the identical grounds raised here. He petitioned the District Court to revise this order and, when his petition was denied, allowed this judgment to become final. He now selects a tiny portion of the record on the order of sale and brings it to this Court in an effort to escape the consequences of filing his petition in bank-

ruptcy. He is seeking a discharge of his obligations without surrendering his property. He is entitled to no relief.

Respectfully submitted,

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